ARTICLE APPEARED
ON PAGE C-8

WASHINGTON POST
24 February 1985

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This Was a Useful Trial

Journalists, whether they intend to or not, are constantly issuing report cards on public figures. CBS, in its contested documentary on the Vietnam War, flunked Gen. William C. Westmoreland. Then after the general agreed to withdraw his $120 million libel suit, CBS regraded him. This time the network gave him an "A" in character but stuck with its "F" in military conduct. Both the general and CBS say that they are now satisfied. Very statesmanlike—but signifying what?

"Without a jury verdict, it was a waste of time and money," said some. "This never should have been in court in the first place," said everybody. And in a triple-header, the general, CBS and the presiding judge, one after the other, all said that history should deliver the real verdict not the courts.

Having attended the 67-day trial and talked to the major participants and the press around them, I disagree with those conclusions. Instead, I find the *Westmoreland v. CBS* trial, together with the very different *Sharon v. Time* case, to be two of the most reverberating and, it turns out, worthwhile libel outcomes in modern American history. Good for the press, good for the law and good for the public.

Consider first the news media. Whatever their recent "victories" in libel suits, or even their claims that they see no reason to change their basic ways, they have been profoundly affected. Their habits and processes have been opened up for the whole world to see, just as relentlessly as they lay bare the work and lives of others. As a result, journalists inevitably will now be more aware than ever before that their methods, thoroughness, accuracy, fairness, even their manner and attitude, may one day be subject of such inspection. Those who reported or even followed these trials have been forced to ask themselves how their own work would measure up under such scrutiny. There is not a serious journalist alive—or maybe even a rancid scandal-monger—who will not be more careful in the future. Not bad.

But is this the so-called "chilling effect"? I think not. There are no signs that the big news media have been scared off tough but important stories when they have the proof they need to publish or broadcast. More careful, yes—but what's wrong with that so long as their constitutional protection remains in tact? If the news media can show professional care and honest conviction that they believe they were right, they're unlikely to have a problem with the law. They may have to face the possibility of public embarrassment for their mistakes or excesses—as Time and CBS did—but not the penalty of actually losing in the courts.

True, for smaller publishers and broadcasters, the very threat of costly litigation has made some turn away from hardball reporting. That remains a serious problem. But there are possible deterrents for that in new court procedures and within the press itself. Since the big media companies are so concerned about erosion of First Amendment rights, perhaps they and their insurance companies should explore ways—much as their adversaries are doing—to protect their smaller media brethren from harassment by rascals and threats to important free-press values.

As important a change coming from these two big libel suits is in the legal process itself, brought about by the two inventive federal judges who heard the cases. Sitting in courtrooms three floors apart on Manhattan's Foley Square, they pioneered a new kind of jury management. The need was plain enough. In the past almost every victory by a public figure against the press was either overturned or sharply reduced by higher courts. When it repeatedly takes judges to overrule confused juries, then it must be time for a change.

And so we got it. The root of the problem was, of course, the Supreme Court's creation of the "actual malice" doctrine 20 years ago. The court might just as well have written the words in Urdu since the term had nothing to do with its common, English-language meaning: ill will, spite or unfairness. "Actual malice" from then on was to mean only that the journalist was either lying or made no effort to find out the truth. But no one other than judges, lawyers and media mavens understood that definition.

To clean up the malice mess, in the Sharon case Judge Abraham Sofaer gave the jurors a detailed questionnaire. He had them answer each interlocking question in waves, also allowing them to give in court their opinion on the quality of the journalism. The result was the most sophisticated jury verdict in modern libel history.

Then in the Westmoreland case, Judge Pierre Leval, with thoughtful and impressive fairness, fathered another change. He found the term "actual malice" so confusing to jurors that he barred it from his courtroom altogether, substituting "state of mind" as a clearer version of what the Supreme Court intended. And although the case never went to the jurors, he too was prepared to have them answer separate questions at judgment time, thus offering an opportunity for them to rule on the truth or falsity of the story, apart from the imperatives of the law.

For perhaps the first time, both juries clearly understood what the law was and why it was so. And in the wide coverage of the trials, the public got a similar education. It is hard to believe that judges in future cases will not use these new methods to make more sense out of tangled legalisms.

Will this increase or decrease the number of libel suits? The "heavy burden" imposed on public figures to win expensive lawsuits has not only been underscored but now trumpeted across the airwaves and newsprint of the United States. It remains to be seen what effect this will have. But it seems likelier that it will discourage rather than invite more such cases.

Nobody enjoys libel suits—not the plaintiffs or the defendants. But in these two cases, both produced unintended benefits. They have stimulated—but not forced—the press to improve its own standards. At the same time, the novel conduct of the trials has created new public understanding of vital First Amendment protections. Taken together, those results far outweighed the earlier judgment that neither case would do us any good in court.

The writer, former chief of correspondents of Time-Life, is writing a book on public mistrust of the press, under the auspices of the Twentieth Century Fund.